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In the Supreme Court of the United States

OCTOBER TERM, 1979

TURLOCK IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

UNITED AIR LINES, INC., ET AL., PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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These actions involve challenges to an increase in rates charged by the City and County of San Francisco for electricity produced by the Hetch Hetchy hydroelectric power project. Petitioners contend that the rates must be approved by the Secretary of the Interior under the terms of the Raker Act.

1. In 1913, Congress passed the Raker Act, ch. 4, 38 Stat. 242, granting San Francisco certain federal lands and rights of way for use in developing a municipal water

supply and hydroelectric power plant in the Hetch Hetchy Valley of Yosemite National Park. Because of congressional concern that Hetch Hetchy power might be sold at unreasonable rates, the Act placed conditions and restrictions on the rates San Francisco may charge its customers.[1] Section 9(m) of the Act, 38 Stat. 248, mandates that rates be based on the municipality's actual cost of operating the system; Section 9(o) mandates that rates "shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made, fixed, or collected without such approval * * *." 38 Stat. 249.

When the Raker Act was enacted, municipally-owned public utilities were regulated by an independent state agency, the California Railroad Commission (predecessor to the California Public Utilities Commission). Congress was keenly aware of this state regulatory authority and intended to rely on the Commission to set reasonable rates for Hetch Hetchy power.[2] In 1920, however, the

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[1]Hetch Hetchy power in excess of that needed for municipal purposes or dedicated under mandatory provisions of the Act is sold by San Francisco to its tenants at San Francisco International Airport (among them the airline petitioners in No. 79-1479), to the Turlock and Modesto Irrigation Districts (petitioners in No. 79-1256), to Norris Industries, Inc., and to other industrial customers (Pet. App. A-3). ("Pet. App." refers to the appendix to the petition in No. 79-1256.) Although Congress anticipated that Hetch Hetchy power would be sold directly to San Francisco's residents, the municipality never developed a suitable distribution system. Therefore, private citizens obtain power from the Pacific Gas and Electric Company (PG&E), a privately-owned utility (Pet. App. A-11 n.4).

[2]See, *e.g.*, 50 Cong. Rec. 3920 (1913) (remarks of Rep. Knowland); 51 Cong. Rec. 55 (1913) (remarks of Sen. Works).

California Supreme Court held in *City of Pasadena* v. *Railroad Commission*, 183 Cal. 526, 192 P. 25, that the Commission lacked jurisdiction over municipal utilities.

Although the record in this case does not disclose how the rates charged by San Francisco for Hetch Hetchy power during the quarter-century following the *Pasadena* decision were set or regulated, it is conceded that beginning in 1946 and continuing into the mid-1970's, all contracts between San Francisco and the irrigation district petitioners were submitted to the Secretary of the Interior for rate approval (Pet. App. B-16).

In July 1975, over the Secretary's express objection that San Francisco could not impose new Hetch Hetchy rates without his prior approval (Pet. App. D-3), the municipality implemented a new and substantially higher rate schedule identical to the schedule of Pacific Gas and Electric Company. Indeed, San Francisco's new rate schedule included a fuel adjustment clause even though Hetch Hetchy power (unlike PG&E power) is hydroelectrically generated (*id.* at D-5 to D-6). Again in September 1976 and a third time in July 1977, San Francisco increased its rates for Hetch Hetchy power by adopting new PG&E rate schedules revised to cover the greatly increasing costs of fuel oil (*id.* at A-3, D-6). None of these rate increases was or has been approved by the Secretary.

2. This litigation began as two separate actions. The "Airlines" case arose when tenants at San Francisco International Airport refused to pay the increased rate charges. After San Francisco brought suit in state court, the action was removed to the United States District Court for the Northern District of California, and the Secretary of the Interior and the Department of the

Army intervened as defendants.[3] On cross motions for summary judgment, the district court "entered an order * * * in which it determined that 'the increased rates charged by [the City] for electric service * * * are not subject to review by and do not require approval of the Secretary of the Interior' " (Pet. App. A-4). The district court then certified the question to the court of appeals pursuant to 28 U.S.C. 1292(b).

The "Irrigation Districts" case was brought by the Turlock and Modesto Irrigation Districts in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief against San Francisco. The Secretary intervened as a plaintiff. Contrary to the holding in the "Airlines" case, the district court held that Section 9(o) of the Raker Act requires prior Secretarial approval of rate increases for Hetch Hetchy power and enjoined San Francisco from selling such power at rates in excess of those approved by the Secretary (Pet. App. B-3 to B-17).

On appeal, the court of appeals consolidated the cases and held that the Secretary's approval of the rate increases is not required under the Raker Act (Pet. App. A-1 to A-13). The court reasoned that Hetch Hetchy power rates are approved by the San Francisco Public Utilities Commission and that the San Francisco PUC was created by the City Charter, which in turn (having been approved by resolution of the state legislature) has

[3]Insofar as Norris Industries, Inc. was subject to the rate increases, the Department of the Army was the real party in interest, because Norris operated a government-owned facility (the Riverbank Army Ammunition Plant) and passed through to the Army all increased charges (Pet. App. A-4, D-6).

the force of state law. Therefore, the court concluded, the rates set by the San Francisco PUC pursuant to the City Charter "conform to the laws of the State of California" within the meaning of Section 9(o) of the Raker Act (*id.* at A-11).

3. The United States agrees with petitioners that the court of appeals erred in its construction of the Raker Act. The plain language of Sections 9(m) and (o) of the Act, together with the Act's legislative history, establish that Congress envisioned that rates charged by San Francisco for Hetch Hetchy power would be reviewed by a statewide regulatory agency and that, should state law not provide for such review, the rates would be subject to approval by the Secretary. The court of appeals' conclusion that rates set by San Francisco's local Public Utilities Commission conform to the laws of California and therefore do not require Secretarial approval flies in the face of congressional intent that there be an independent check on the municipality's authority to set excessive rates for Hetch Hetchy power.

Although we believe the decision of the court of appeals is clearly wrong, we have not petitioned for a writ of certiorari because in our view this case lacks sufficient general importance to justify further review. The decision below does not affect provisions of the Raker Act other than those directly involved here, nor does it affect other programs or projects administered by the Secretary of the Interior. Moreover, while we believe that the court of appeals' decision unjustifiably abandons the rate review mechanism established by Congress, it does not leave San Francisco with unbridled discretion in setting rates for Hetch Hetchy power. Hetch Hetchy rates must be approved by the San Francisco PUC and are then subject

to judicial review in the state courts for reasonableness (Pet. App. A-7). While such review may not provide protection comparable to that envisioned by the Raker Act (see 79-1479 Pet. 8-9), it does serve as a limited check on the kinds of abuse Section 9(o) was designed to stem.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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